

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10675 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
 2. To be referred to the Reporter or not? Yes
 3. Whether Their Lordships wish to see the fair copy of the judgement? No
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
 5. Whether it is to be circulated to the Civil Judge?

No

BHAGWANDAS J PATEL

Versus

DEPUTY COMMISSIONER OF INCOME TAX

Appearance:

MR SN SOPARKAR for Petitioner

MR MIHIR JOSHI WITH MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and

MR.JUSTICE A.R.DAVE

Date of decision: 28/12/98

ORAL JUDGEMENT (per R. Balia, J.)

Rule. Service of rule is waived by learned counsel for the respondent. At the request of learned counsel for the parties the matter is finally heard today.

2. The petitioner challenges order (Annexure A) dated 29.10.1998 purported to have been made u/s 179 of the Income-tax Act, 1961.

3. As per the order, a demand of Rs. 9,82,050/were outstanding against a company named Samir Theatre Pvt. Ltd. for A.Y. 1986-87 and 1987-88. The present petitioner was a director of the said private company during the previous year relevant to the aforesaid assessment year. The order directing recovery from the present petitioner as director of the said company during the relevant previous year proceeds on the premise, "since the recovery of the demand from the company was found difficult". In response to show-cause notice the petitioner has stated that demand has been created after handing over all the assets and liabilities to the new director as per the agreement made between Shri Bhagwandas and Bholabhai V. Patel and all the assets and liabilities have been taken over by Shri Bholabhai V. Patel, presently the Director. It further proceeds that as the director petitioner has failed to show that non-recovery of income tax is not attributable to any gross neglect, misfeasance or breach of duty on his part relating to conducting the affairs of the company and therefore the reply to the show-cause notice is not treated satisfactory.

4. The order is challenged, inter alia, on the ground that the order does not disclose the necessary precondition for invoking sec. 179 for directing the recovery of amount due from a private company to its erstwhile director inasmuch as sec. 179 requires that in case where any tax due from a private company cannot be recovered then only a person who was a director of the private company at any time during the relevant previous year can be held jointly and severally liable for the payment of such tax. The order itself does not say that the amount cannot be recovered from the assets of the company. It has been specifically stated in the petition that the petitioner had pointed out to the respondent that the company owns assets of substantial value and in particular a commercial complex on Ashram Road, Ahmedabad, value of which itself runs into crores of rupees which is sufficient to discharge company's liabilities towards tax amount due for the relevant previous year. In reply to notice, an affidavit has been submitted disclosing that because of agreement between the petitioner and the successor management, the liability for the period upto 24.2.86 was required to be discharged by the previous directors hence the recovery is directed towards the previous directors. As to the

plea of the petitioner that there is dispute between the parties to agreement about discharging that part of liability, the affidavit states that petitioner's allegation to the contrary is not tenable. In sum and substance, by perusing the affidavit-in-reply, it is apparent that the respondents instead of making any effort to recover the amount of tax due from the said private company from the properties belonging to the company, about which there does not appear to be any dispute, the revenue authorities are seeking to recover the amount from the petitioner in pursuance of the agreement between the outgoing management and the incoming management. In other words, the revenue authorities are assisting one party to enforce terms of agreement against another notwithstanding existing dispute between them. To say the least, that cannot be the role of the revenue authorities in implementing the Income-tax Act while invoking provisions of recovery. Primarily the liability to be discharged by the company which itself is a juristic person and enforcement has to be against the assets of the company which has perpetual existence, notwithstanding change in the management. Sec. 179 only provides an alternate mode of recovery in certain contingency.

5. Section 179 reads as under:-

"Notwithstanding anything contained in the Companies Act, 1956, where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at anytime during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company."

A bare perusal of the provision shows that before recovery in respect of dues from the private company can be initiated against director, to make them jointly and severally liable for such dues, it is necessary for the revenue to establish that such recovery cannot be made against the company and then and then alone it can reach the directors who were responsible for the conduct of business during the previous year in relation to which liability exists.

6. Neither in the order nor in the affidavit any such assertion has been made that in spite of making efforts against the company, it is not possible to recover the amount from the company by reaching its assets. On the other hand, there is clear indication that sec. 179 is being put to use by revenue authorities to resolve the dispute between the erstwhile directors and the present incumbent about the terms of agreement between them. The Income-tax Act has not assigned any such role to its authority to act as an arbiter of inter se dispute between the parties which does not concern it. We are therefore satisfied that provisions of sec. 179 has been invoked without laying necessary foundation for the same. The order therefore suffers from the error apparent on the face of it, and is ultra vires sec. 179.

7. Accordingly, this petition succeeds. The impugned order (Annexure A) u/s 179 of the Income-tax Act is quashed. Rule is made absolute. There shall be no order as to costs.

(hn)